



EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

**SPECIAL**

May 30, 1984

LEGISLATIVE REFERRAL MEMORANDUM

LEGISLATIVE LIAISON

84-3056

TO:

LEGISLATIVE LIAISON OFFICER

Department of Defense

~~Central Intelligence Agency~~ (DOJ report only)

Department of Justice (CIA report only)

National Security Council

General Services Administration

Department of the Treasury

per phone call to  
OMB 6/6/84  
stated CIA  
had  
"no  
objection"  
RDB

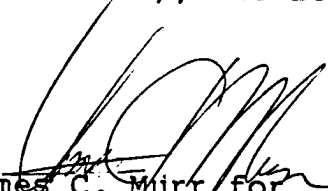
SUBJECT:

Draft CIA and Justice reports on H.R. 4826, a bill concerning nonconsensual recordings of telephone conversations

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than  
Wednesday, June 6, 1984

Direct your questions to Branden Blum (395-3802), the legislative attorney in this office.

  
James C. Murr for  
Assistant Director for  
Legislative Reference

Enclosure

cc: A. Curtis  
F. Reeder

M.A. Chaffee  
A. Donahue

M. Uhlmann  
F. Fielding

C. Wirtz



Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Peter W. Rodino, Jr.  
Chairman  
Committee on the Judiciary  
House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

This is in reference to the scheduled May 23 mark-up of H.R. 4826, a bill to forbid the recording of telephone conversations by federal public officials and employees without the consent of all parties to such conversations. For the reasons set out below, we vigorously oppose this legislation.

First, we believe that the conduct covered by H.R. 4826 -- recording by federal employees of telephone communications to which they are a party -- is totally inappropriate for treatment in federal criminal law. It seems a very poor use of limited federal law enforcement resources to have busy FBI agents investigating allegations that a federal employee has recorded a telephone conversation to which he or she was a party when identical conduct by any other citizen would be lawful. The fact that federal employees are subject to disciplinary action makes treatment of such conduct as a criminal offense all the more inappropriate and wasteful of limited law enforcement resources. In short, we believe H.R. 4826 is an over-reaction to the understandable public outcry which followed disclosure that a high government official had secretly recorded telephone conversations in situations having nothing to do with law enforcement. It would, in our view, be highly unfortunate if this episode resulted in unwarranted legislation that would needlessly burden federal law enforcement agencies.

Second, while H.R. 4826 contains an exception for government personnel "empowered by law to conduct investigations of or make arrests for criminal offenses while such officer is engaging in such an investigation or arrest," this law enforcement exception is inadequate. The bill would still inhibit the performance of legitimate and totally nonintrusive investigative and prosecutive

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activities. For example, to avail himself of the exception, a federal law enforcement officer would have to show that he was engaged in an actual investigation when he made the recording. This factor may not be clear in a situation where a person calls the FBI or some other federal law enforcement agency to report a crime. Making a recording of such a preliminary call could be of invaluable assistance in a number of situations, such as if the caller begins to speak in a foreign language with which the agent is unfamiliar, or with a heavy foreign accent.

Moreover, even if the concept of an "investigation" were stretched to include a recording of such a preliminary call by law enforcement officers, it still would not allow other federal employees, acting on their own or as an informant for law enforcement officers, to record conversations concerning criminal activity. Thus, a federal employee who records a threat, a bribe offer, or an obscene or harassing telephone call would violate the statute. As if this were not enough, because such a recording would have been made in violation of the statute, it might be ruled inadmissible in the federal trial of the person who offered the bribe or made the threat. Thus, the criminal might go free while the employee, acting only for the best of motives, could be cited as a criminal facing a potential term in prison and a \$100,000 fine. Again, it would be unfortunate if one well-publicized incident of secret telephone recording by a high government official -- which did not involve law enforcement -- were to result in enactment of legislation impeding law enforcement.

Third, the bill as reported contains no scienter requirement such as that the defendant acted willfully or knowingly. Neither does it require that any publication, disclosure or other use of the recording be proved, only that a telephone conversation was recorded on magnetic tape. Thus, it would apply to a federal employee who inadvertently recorded a call and then immediately erased the tape or who, as a party to a four-person conference call, forgot to get the permission of one of the other three persons before making a recording. While such persons are unlikely to be prosecuted, there is no justification for a statute that makes such conduct criminal.

While we do not condone the conduct of one who secretly records his own telephone conversations, there is a considerable difference between the harm caused by this type of activity and by a secret interception of a telephone conversation without the consent of either party. A criminal penalty is, in our view, not appropriate for the former type of conduct, which can be handled adequately by administrative sanctions. Such an administrative approach would provide proper punishment for the occasional federal employee who

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secretly records his own conversations. ~~If the Committee disagrees~~  
with this position and feels that legislation is absolutely  
necessary, we would request that it carefully consider the need to  
address our concerns with the bill as drafted from the standpoint  
of federal law enforcement. The intelligence agencies also have  
serious concerns over the bill's impact on their operations, and  
legislation in this area should take into account these problems  
~~as well.~~

} OMB  
deletion

For the foregoing reasons, the Department of Justice strongly  
opposes H.R. 4826 and respectfully urges the Committee to approach  
this ~~(emotion-charged)~~ issue with the prudence and caution which it  
deserves.

→ sensitive

Sincerely,

Robert A. McConnell  
Assistant Attorney General

The Office of Management  
and Budget advises that there  
is no objection to the submission  
of this report from the standpoint  
of the Administration's program.